ORIGINAL

Supreme Court, U.S.
FILED
JUL 19 1993
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-19

STATE OF TENNESSEE,

Petitioner,

vs.

JOHN MICHAEL BANE and
LEONARD EDWARD SMITH,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, JOHN MICHAEL BANE, who is now confined on death row at Riverbend Maximum Security Institution, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the Tennessee Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The respondent's affidavit in support of this motion is submitted herewith.

Respectfully submitted,

BROCK MEHLER
704 18th Ave. So.
Nashville, TN 37203
(615) 256-9780
FAX 256-9774
Attorney for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

No. 93-19

STATE OF TENNESSEE,

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v.

JOHN MICHAEL BANE and
LEONARD EDWARD SMITH,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, JOHN MICHAEL BANE, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No. My last employment was 1988, and my salary was $ 180/week.

2. I have received no income within the past twelve months from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources.

3. I own no cash or checking or savings accounts.

4. I own no real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. No one is dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John Michael Bane
JOHN MICHAEL BANE

SWORN TO AN SUBSCRIBED TO before me this 2nd day of July, 1993.

Notary Public

My commission expires 3-26-94

No. 93-19

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF TENNESSEE,

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JOHN MICHAEL BANE and
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Respondents.

RESPONDENT BANE'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BROCK MEHLER
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Counsel for Respondent

QUESTION PRESENTED

WHETHER IN A CAPITAL FELONY MURDER PROSECUTION, THE EIGHTH AMENDMENT PROHIBITS THE SENTENCER FROM CONSIDERING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN THE PERPETRATION OF A FELONY?

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October Term, 1993

STATE OF TENNESSEE,

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Respondents.

RESPONDENT BANE'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

INTRODUCTION

The respondent, JOHN MICHAEL BANE, respectfully prays that the Petition for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of the State of Tennessee, entered in the above-entitled proceedings on March 29, 1993, be denied.

OPINION BELOW

The opinion of the Supreme Court of the State of Tennessee in the respondent's case was filed on March 29, 1993. It has not yet been published. A copy of the opinion appears as Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Repondent Bane was indicted for common law murder and felony murder in connection with the death of Royce Frazier. He was tried and convicted of felony murder in February, 1990, and sentenced to death upon jury findings that the murder was heinous, atrocious, or cruel, T.C.A. §39-2-203(i)(5), that the murder occurred during the attempt to commit a robbery, T.C.A. §39-2-203(i)(7), and that the aggravating circumstances outweighed any mitigating circumstances. On direct review, the Tennessee Supreme Court affirmed respondent's conviction, but reversed his death sentence based upon its ruling in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992).

REASONS FOR DENYING THE WRIT

The Court should deny the State's petition because Middlebrooks itself was decided on an independent and adequate state ground, to wit: that Tennessee law prohibits the use of aggravating factors which duplicate the elements of the offense.

Respondent Bane was convicted of felony murder and sentenced to death upon findings that the murder was committed in the course of a felony, T.C.A. §39-2-203(i)(7), that the murder was especially heinous, atrocious, or cruel, T.C.A. §39-2-203(i)(5), and that there were no mitigating circumstances sufficiently substantial to outweigh these two aggravating factors. In this respect, his case mirrors that of the defendant in Middlebrooks, and Bane's death sentence

was reversed based on the Tennessee Supreme Court's holding in Middlebrooks. That holding, notwithstanding reference to and discussion of various aspects of this Court's Eighth Amendment jurisprudence, was based upon an adequate and independent state law ground.

In Part III of the majority opinion in Middlebrooks, the Tennessee Supreme Court defines the state law ground in the following manner:

> [D]uplication of the elements of the offense by one of the aggravating factors has been challenged by capital defendants in the past. Some of the earlier attacks were based on double jeopardy and the argument that conviction under the felony murder aspect of § 39-2-202 required an automatic or mandatory death penalty because the jury had already found beyond a reasonable doubt the existence of an aggravating circumstance at the guilt phase of the trial. These arguments were rejected by the Court. (citations omitted). Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, *see* Tenn. Code Ann. § 40-35-111 (1982) and § 40-35-114 (1990), and we are of the opinion that Article I, § 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well.

840 S.W.2d 341 (Tenn. 1992) (emphasis added) [1]

Thus, separate and distinct from any question which might involve federal law, there is a judgment that the Tennessee Constitution requires equal treatment of capital and non-capital offenders vis-a-vis the use of aggravating factors which duplicate the elements of the offense. This aspect of the Middlebrooks decision is based solely on Article I, § 16 of the Tennessee Constitution, and is neither interwoven with nor derived from Eighth Amendment caselaw.

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[1] T.C.A. §40-35-114 provides in pertinent part: "If appropriate for the offense, enhancement factors, if not themselves essential elements of the offense as charged in the indictment, may include. . . ." The Sentencing Commission Comments state, "The various enhancement factors are similar to several provisions of prior law. In all instances the enhancement factors can be utilized by the trial judge if those factors are 'not themselves essential elements of the offense as charged in the indictment.' This follows prior law which prohibits enhancement for a matter which is already an element of the offense. See State v. Lambert, 741 S.W.2d 127 (Tenn.Crim.App. 1987)."

It is "clear from the face of the opinion," Michigan v. Long, 463 U.S. 1032, 1041 (1983), that the judgment in Middlebrooks is based on an independent and adequate state law ground. Indeed, it is difficult to imagine a clearer expression of a "bona fide separate, adequate, and independent ground," Id. at 1041, than that which is contained in the underlined portion of the majority opinion quoted above. All that is missing is the formulaic phrase which this Court said it would not require. Coleman v. Thompson, ___U.S.___, 111 S.Ct. 2546, 2559 (1991) ("we will not impose on state courts the responsibility for using particular language").

Middlebrooks is distinguishable from Michigan v. Long, and the presumption which this Court announced in Long is inapplicable. In Long, the Michigan Supreme Court referred twice to the State Constitution in its opinion, but otherwise relied exclusively on federal law; both references to the State Constitution were joined with citations to the Federal Constitution. *See*, Long, *supra*, at 463 U.S. 1037, n. 3. In Middlebrooks, the first basis announced for the decision involves *only* provisions of Tennessee statutory and constitutional law, and no reference whatsoever is made to the Federal Constitution or federal caselaw.

Middlebrooks is not a case in which the state court *could* have relied upon an available state ground but chose not to, *cf.* Beecher v. Alabama, 389 U.S 35, 37, n. 3 (1967), nor is it a case in which the state court's decision appears to be compelled by its belief as to what federal law seemed to require. The independence of the state ground in Middlebrooks is "apparent from the four corners of the opinion." Long, *supra*, at 463 U.S. 1040.[2]

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[2] In its discussion of federal law, at 840 S.W.2d 345-346, Part III of the majority opinion in Middlebrooks considers the holding in Lowenfield v. Phelps, 484 U.S. 231 (1988). The Tennessee Supreme Court was certainly aware that under Lowenfield there is no federal constitutional error if an aggravating circumstance duplicates one of the elements of the crime. (continued...)

Not only does the majority opinion in Middlebrooks expressly state that its decision is based on a separate and adequate state constitutional provision, but even its *alternative holding* -- that the use of the felony murder aggravating circumstance does not sufficiently narrow the class of death-eligible offenders -- does not "fairly appear to rest primarily on federal law or to be interwoven with federal law." Long, *supra*, at 463 U.S. 1040; Coleman, *supra*, at 111 S.Ct. 2557.

Although part III of the majority opinion in Middlebrooks discusses a number of this Court's Eighth Amendment cases, unlike the Michigan Court in Long it does not rely *exclusively* on its understanding of federal cases, and it ultimately adopts the legal arguments and reasoning contained in a state court case, State v. Cherry, 257 S.E.2d 551 (N.C. 1979), and a case from the 8th Circuit Court of Appeals, Collins v. Lockhart, 754 F.2d 258 (1985), which had been overruled and was no longer federal law. Thus, even the alternative holding with respect to the failure to narrow the death-eligible class fairly appears to rest primarily on an interpretation of state rather than federal law.

In Coleman this Court said that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment (citations omitted)." at 111 S.Ct. 2553-2544. As the opinion explains:

> Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

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[2](...continued)
Yet, it is specifically and clearly stated in Middlebrooks that such duplication violates Article I, § 16 of the Tennessee Constitution.

> See *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-464, 89 L.Ed. 789 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion"). * * * When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257 it is reviewing the *judgment*; if resolution of the federal question cannot affect the judgment, there is nothing for the Court to do.

Id. at 2554 (underlined emphasis added).

Respondent respectfully submits that the Petition for Writ of Certiorari in Middlebrooks was improvidently granted, and that this Court is without jurisdiction to review the Tennessee Supreme Court's determination in Middlebrooks or in respondent Bane's case because the "same judgment would be rendered" based on the holding that "duplication" violates Article I, § 16 of the Tennessee Constitution. Any opinion by this Court with respect to what the Eighth Amendment does or does not require would only be advisory.

CONCLUSION

For these various reasons, the State's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BROCK MEHLER
704 18th Ave. So.
Nashville, TN 37203
(615)256-9780
FAX 256-9774
Attorney for Respondent

AFFIDAVIT OF CERTIFICATE OF SERVICE

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

I, BROCK MEHLER, being first duly sworn, make oath that I am a member of the Bar of the Supreme Court of the United States.

I further certify that on the 19th day of July, 1993, I deposited ten (10) copies of the instant Respondent Bane's Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to the Clerk of this Court and within the time allowed for filing; that I deposited one (1) copy of the instant Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to Charles W. Burson, Esquire, Attorney General & Reporter for the State of Tennessee, 450 James Robertson Parkway, Nashville, TN 37243-0485, and within the time allowed for service.

I further certify that all parties required to be served have been served.

Brock Mehler
BROCK MEHLER
Attorney for Respondent

Sworn to and Subscribed before me on this the 19th day of July, 1993.

Juanita A. Price
NOTARY PUBLIC

My Commission Expires: 11-25-95

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July 19, 1993

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Honorable William K. Suter
Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: State of Tennessee v. John Michael Bane and Leonard Edward Smith

Dear Sir:

Please find enclosed an original and ten copies of the following documents for filing:

1) Respondent Bane's Motion for Leave to Proceed in Forma Pauperis and supporting Affidavit;
2) Respondent Bane's Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee;
4) Respondent Smith's Motion for Leave to Proceed in Forma Pauperis and supporting Affidavit; and
6) Respondent Smith's Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee

Your assistance in this matter is greatly appreciated. If you have questions, please do not hesitate to contact me.

Sincerely,

Brock Mehler

Brock Mehler

BM/jp
Enclosure

cc: Honorable Charles W. Burson